Supreme Court, U.S.
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IN THE
**Supreme Court of the United States**
October Term, 2002

PETER PAUL MITRANO,
*Petitioner,*

*versus*

VIRGINIA LEE KELLY,
*Respondent.*

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On Petition for a Writ of Certiorari to the
Supreme Court of the State of New Hampshire

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Peter Paul Mitrano
*Pro se*
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

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## Questions Presented for Review

1. Whether or not the trial court had subject matter jurisdiction under Title 28, United States Code, Section 1738A in view of the fact that on the end of the day on December 20, 2000, no party was remaining in the State of New Hampshire? The mother had moved to State of Vermont prior to filing this action; the children were living in both the State of Vermont and the State of New Hampshire when this action was filed; and, the father moved out of the State New Hampshire and left the State New Hampshire with the children on December 20, 2000.

2. Whether or not the proceeding before the trial court were sham proceedings? The trial court took away the children from the primary custody of the father first on an exparte orders in violation of Title 28, United States Code, Section 1738A(e), the trial court has proceeded even after the trial court no longer had subject matter jurisdiction, the trial court has denied the father's constitutional rights to even visit his children since January 5, 2001 without any justified basis, the trial court has repeatedly misstated facts and willfully committed numerous errors of law, the trial court has denied the father due process (both procedural and substantive) and equal protection under the law, the trial court has denied the father the right to present witnesses, the right to cross-examine witnesses, has quash subpoenas without an adequate basis, has quash subpoenas exparte without adequate without an adequate basis, has granted motions without

adequate notice that said motions would be heard, has held the father in contempt of court for moving out of the State of New Hampshire with his children, has held the father in contempt of court for signing proposed stipulations of the guardian ad litum under protest, threaten the father with contempt of court for standing up at counsel table to make objections, has refused to allow the father to record the proceedings with an independent court reporter, refused to allow the father to state objections for the record, has walked out of the court room without allowing the father to state his objections on the record, has ordered the father to pay child support beyond his income, has ordered the father to pay attorney's fees from lawyers involved in proceedings out of the State of New Hampshire, has allowed his personal prejudice against the spanking of children to bias his decision making, has ordered the father to under go psychiatric testing even though there is no basis for the same, has transferred custody of children in violation of the laws of New Hampshire, etc.

3. Whether or not the proceeding before the trial court lacked procedural due process for the father?

4. Whether or not the proceeding before the trial court lacked substantive due process for the father?

5. Whether or not the trial court should have recused the trial judge?

6. Whether or not the trial court erred in not enforcing the Commonwealth of Virginia Child Custody Order entered in accordance with Title 28, United States Code, Section 1738A?

7. Whether or not the trial court erred in requesting the father to leave the witness stand when the father was not finish testifying?

8. Whether or not the trial court erred in not allowing the father to finish the presentation of evidence?

9. Whether or not the trial court erred in accepting proffers from opposing counsel when the father requested live testimony?

10. Whether or not the trial court erred in improper squashing of subpoenas of witnesses on an ex parte basis without adequate notice to the father?

11. Whether or not the trial court erred in denying the father's request to cross-examine witnesses of the opposing side?

12. Whether or not an attorney admitted to the bar of the State of New Hampshire and other courts, who is appearing solely in a *pro se* capacity, has a right to freedom of speech under the United States Constitution that trumps any rules prohibiting an attorney from exercising his right to freedom of speech under the United States Constitution?

13. Whether or not the trial court erred in failing to comply with RSA 458-A:21 in that the trial court never requested the required documents from the Commonwealth of Virginia?

14. Whether or not mother wrongfully failed to return the two boys to the father after her scheduled visitation ended on Monday, January 8, 2001?

15. Whether or not the ex parte New Hampshire order dated January 3, 2001 that dealt with the two boys is void because the trial court failed to give notice as required under Title 28 of the United States Code, Section 1738A(e)? Title 28 of the United States Code, Section 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child."

16. Whether or not the father appropriately disciplined his daughter for being disrespectful by spanking her on her bottom with his hand?

17. Whether or not the father has done nothing wrong and is being denied his lawful right to custody?

18. Whether or not the father is in contempt of court for moving when the father was not required to give notice and was not required to obtain the consent of the mother prior to moving to the State that issued the initial custody order?

19. Whether or not the father has a constitutional right and freedom to travel and whether or not the father and his children are wards of the State of New Hampshire?

20. Whether or not the trial court erred in not enforcing the permanent custody Order of the Circuit Court of Fairfax County, Virginia and further order that the children of the parties: Christina Lee Mitrano (now age 17); Peter Paul Mitrano (now age 15); and, Christopher Louis Mitrano (now age 10) be immediately returned to the father?

21. Whether or not the trial court erred in awarding attorney's fees for matters before courts in other jurisdictions?

22. Whether or not the trial court erred in requiring the father to pay the approximate sum of $3,000.00 per month for private boarding school in the State of New York for his daughter when no testimony was offered that the father had previous knowledge and/or consent of same or when no testimony was presented as whether said private boarding school in the State of New York for his daughter was required?

23. Whether or not the trial court erred in ordering a psychiatric examination of the father against his will without an adequate basis in the record?

24. Whether or not the trial court erred in awarding attorney's fees without any testimony?

25. Whether or not the trial court erred in holding the father in contempt of court for signing the guardian ad litum stipulations under protest after the court threaten the father with contempt of court if the father did not sign said guardian ad litum stipulations against his will and over the objections of the father?

26. Whether or not the trial court erred in threatening the father with contempt of court for standing up to make objections?

27. Whether or not the trial court erred in refusing to allow independent court reporter to record part of the proceedings?

28. Whether or not the Supreme Court of New Hampshire erred in denying the father's Emergency Petition Seeking to Restrain and Stay the Actions of the State of New Hampshire, Grafton County Judicial Branch, Lebanon Family Division and also for Enforcement of the Attached Custody Order [Commonwealth of Virginia Child Custody Order] filed before said Supreme Court on or about January 10, 2001 and denied by said

Supreme Court without prejudice shortly thereafter.

29. Whether or not the trial court erred in ordering the father to make child support payments in the amount of $1,406.00 per week?

## Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the Supreme Court of New Hampshire. Neither party is a parent, subsidiary or affiliate of any company.

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# Supreme Court of the United States

October Term, 2002

PETER PAUL MITRANO,

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*Respondent.*

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On Petition for a Writ of Certiorari to the Supreme Court of the State of New Hampshire

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## Opinion Below

The order of the Supreme Court of the State of New Hampshire from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The order of the trial court, the Family Court at Lebanon, Grafton County, New Hampshire also appears in the Appendix hereto at page A-3. As a protective measure and out of an abundance of caution, the petitioner also seeks certiorari from the order of the trial court, the Family Court at Lebanon, Grafton County, New Hampshire.

## Jurisdiction

The order of the Supreme Court of New Hampshire was entered on November 22, 2002. The order of the trial court, the Family Court at Lebanon, Grafton County, New Hampshire was entered on September 27, 2002. This petition for writ of certiorari was filed within ninety days of said date of November 22, 2002 and also within ninety days of said date of September 27, 2002. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

This action is related to the Writ of Certiorari to the United States Court of Appeals for the First Circuit filed before this Supreme Court on November 26, 2002 in *Mitrano* v. *Martin,* Docket Number 02-825. This action is also related to *Mitrano* v. *Kelly*, 534 U.S. 1115 (2002).

## Statement of the Case

This petition for writ of certiorari arises from the unlawful change in a custody order originally from the Commonwealth of Virginia by and through a filing on October 16, 2000 by the respondent, Virginia Lee Kelly (hereinafter sometimes referred to as the "mother") in the State of New Hampshire. The petitioner, Peter Paul Mitrano (hereinafter sometimes referred to as the "father") was designated as the primary custodial parent in the custody order from the Commonwealth of Virginia. This case presents a factual and legal scenario that is nothing less than outrageous and every parents' nightmare.

The father claims that he is entitled to the custody of the parties' minor children pursuant to the custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A. The respondent, Virginia Lee Kelly (hereinafter sometimes referred to as the "mother") claims that she is entitled to the custody of the parties' minor children despite said custody order.

The mother has denied the father access to even see his three children since January 5, 2001. The relevant facts are that the Commonwealth of Virginia entered a fully-litigated custody order stating "that the minor children of the parties shall reside primarily with" the father in compliance with Title 28, United States Code, Section 1738A on September 4, 1992. Between September 4, 1992 and October 1, 2000, there has not been any litigation between the mother and the father over the custody of said minor children. Since at least September 4, 1992 until at least October 1, 2000, the minor children of the parties have resided primarily with the father.

Beginning since at least October 6, 2000, the children have lived with their mother in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, when the mother filed a petition to modify a custody order in the State of New Hampshire on

October 16, 2000 (and prior thereto), the children were living in both the State of Vermont and the State of New Hampshire.

The custody Order of the Circuit Court of Fairfax County, Virginia states in part that the parties "shall have joint physical and legal custody of their minor children". Thus, while the mother was exercising her joint physical and legal custody of their minor children and living in the State of Vermont, said minor children were living in the State of Vermont. Because the mother was living with the three children of the parties in the State of Vermont in October 2000 prior to the filing by the mother of her Ex Parte Petition to Bring Cause Forward and Modify on October 16, 2000, the State of New Hampshire was not a "home State" as defined by Title 28 of the United States Code, Section 1738A(b)(4) on October 16, 2000. Accordingly, the State of New Hampshire was not a "home State" of the children "on the date of the commencement of the proceeding". *Also see* Title 28 of the United States Code, Section 1738A(c)(2)(A)(i). Title 28 of the United States Code, Section 1738A(c)(2)(A) states that:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;"

The father left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant[2] living in the State of New Hampshire at the end of day of December 20, 2000. Their daughter, Christina, had been unlawfully living with her mother in the State of Vermont. Their sons, Peter and Christopher, were living in the Commonwealth of Virginia with their father until the mother unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under her right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

Any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject matter jurisdiction. Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii) requires that **"a contestant continues to live in such State"**. It is clear that no contestant continued to live in the State of New Hampshire after December 20, 2000 until at least the end of January 2001.

The father also claims that he has a fundamental right to travel interstate within the United States of America. The State of New

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2. A "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child".

Hampshire has unjustly interfered with the father's said fundamental right to travel interstate by holding the father in contempt of court for moving from the State of New Hampshire to the Commonwealth of Virginia.

The trial court is holding the father in contempt of court for moving out of the State of New Hampshire and/or for not requesting the judge's permission prior to moving out of the State of New Hampshire. The trial court ruled from the bench on January 10, 2001 that the father was in contempt of court for moving out of the State of New Hampshire (the judge later ruled in a written order that the father was in contempt for not requesting the court's permission prior to moving); the father was not required to give notice prior to moving to the Commonwealth of Virginia, the State that issued the initial custody order in effect at the time that states the "minor children of the parties shall reside primarily with "Peter" [the father]; the father has a constitutional right and freedom to travel; the father and his children are not wards of the State of New Hampshire.

The lawlessness of the judge in ruling that the father is in contempt of court is clearly contrary to the established precedent and amounts to a violation of the father's constitution rights. The judge failed to provide any notice whatsoever or any manner of due process to the father prior to holding the father in contempt of court; this is another violation of the father's constitutional rights including but not limited to the right of procedural due process and equal protection under the law.

On September 13, 2000, the father appropriately spanked his daughter on her bottom with his hand for being disrespectful. The father contends that the same is being used as a pretext to deny the father his lawful rights. The state courts in the State of New Hampshire have essentially caused the children involved to become fatherless since January 2001 by ruling that father does not even have visitation rights with his children; the trial court ruled in an order dated December 28, 2000 that the father could not have any visitation rights with his daughter and then solely because the father moved out of the State of New Hampshire to the Commonwealth of Virginia in an order dated January 3, 2001 (six days later), ruled ex parte that the father could not have any visitation rights with his two sons; the trial court has not allowed the father any visitation with his children for over almost two years in violation of father's constitutional rights to be allowed visitation with his children; the trial court willfully violated father's civil rights by denying the father the opportunity to present witnesses at an alleged hearing in April 2001; the trial court did not allow the father to complete his proffers after refusing to allow father's witnesses to testify; the trial court willfully violated the father's civil rights by denying the father the opportunity to cross-examine witnesses at an alleged hearing in April 2001; the trial court only scheduled one hour (over the father's objection) for a hearing on custody of three children; the trial court has repeatedly refused to enforce subpoenas for witnesses to attend alleged hearings; the trial

court ordered father to take an involuntary mental examination by a person chosen by the guardian ad litem; the trial court has willfully failed to follow 28 U.S.C., § 1738A; the trial court has twice found the father in contempt of court without any basis; the trial court has attempted to force the father to enter into stipulations (which contained a waiver of legal rights) against the father's will with the guardian ad litem under the threat of contempt; the trial court has denied the father procedural due process; the trial court has abused his powers of contempt; the trial court threatened the father with contempt of court for standing up to raise an objection at the alleged hearing in April 2001; and, the trial court granted a motion to increase fees for the guardian ad litem that were filed on the same day of court over the objection of the father while denying the father's request for an opportunity to file an opposition to said motion to increase fees in violation of father's rights to reasonable notice, due process, and equal protection under the law.

The trial court issued (1) an (supposedly emergency and illegal because of 28 U.S.C., §1738A(e)) ex parte order dated January 3, 2001 wherein the trial court has since not allowed the father any visitation rights with his children. Meanwhile the father has been under the charge of contempt since January 10, 2001 for moving out of the State of New Hampshire to the Commonwealth of Virginia.

This petition for a writ of certiorari to the Supreme Court of the State of New Hampshire is being filed within ninety days of all final decisions of the courts below.

## Argument

### Questions Presented for Review

1. Whether or not the trial court had subject matter jurisdiction under Title 28, United States Code, Section 1738A in view of the fact that on the end of the day on December 20, 2000, no party was remaining in the State of New Hampshire? The mother had moved to State of Vermont prior to filing this action; the children were living in both the State of Vermont and the State of New Hampshire when this action was filed; and, the father moved out of the State New Hampshire and left the State New Hampshire with the children on December 20, 2000.

2. Whether or not the proceeding before the trial court were sham proceedings? The trial court took away the children from the primary custody of the father first on an exparte orders in violation of Title 28, United States Code, Section 1738A(e), the trial court has proceeded even after the trial court no longer had subject matter jurisdiction, the trial court has denied the father's constitutional rights to even visit his children since January 5, 2001 without any justified basis, the trial court has repeatedly misstated facts and willfully committed numerous errors of law, the trial court has denied the father due process (both procedural and substantive) and equal protection under the law, the trial court has denied the father the right to present witnesses, the right to cross-examine witnesses, has quash subpoenas without an adequate basis, has quash

subpoenas exparte without adequate without an adequate basis, has granted motions without adequate notice that said motions would be heard, has held the father in contempt of court for moving out of the State of New Hampshire with his children, has held the father in contempt of court for signing proposed stipulations of the guardian ad litum under protest, threaten the father with contempt of court for standing up at counsel table to make objections, has refused to allow the father to record the proceedings with an independent court reporter, refused to allow the father to state objections for the record, has walked out of the court room without allowing the father to state his objections on the record, has ordered the father to pay child support beyond his income, has ordered the father to pay attorney's fees from lawyers involved in proceedings out of the State of New Hampshire, has allowed his personal prejudice against the spanking of children to bias his decision making, has ordered the father to under go psychiatric testing even though there is no basis for the same, has transferred custody of children in violation of the laws of New Hampshire, etc.

3. Whether or not the proceeding before the trial court lacked procedural due process for the father?

4. Whether or not the proceeding before the trial court lacked substantive due process for the father?

5. Whether or not the trial court should have recused the trial judge?

6. Whether or not the trial court erred in not enforcing the Commonwealth of Virginia

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7. Whether or not the trial court erred in requesting the father to leave the witness stand when the father was not finish testifying?

8. Whether or not the trial court erred in not allowing the father to finish the presentation of evidence?

9. Whether or not the trial court erred in accepting proffers from opposing counsel when the father requested live testimony?

10. Whether or not the trial court erred in improper squashing of subpoenas of witnesses on an ex parte basis without adequate notice to the father?

11. Whether or not the trial court erred in denying the father's request to cross-examine witnesses of the opposing side?

12. Whether or not an attorney admitted to the bar of the State of New Hampshire and other courts, who is appearing solely in a *pro se* capacity, has a right to freedom of speech under the United States Constitution that trumps any rules prohibiting an attorney from exercising his right to freedom of speech under the United States Constitution?

13. Whether or not the trial court erred in failing to comply with RSA 458-A:21 in that the trial court never requested the required documents from the Commonwealth of Virginia?

14. Whether or not mother wrongfully failed to return the two boys to the father after her scheduled visitation ended on Monday, January 8, 2001?

15. Whether or not the ex parte New Hampshire order dated January 3, 2001 that dealt with the two boys is void because the trial court failed to give notice as required under Title 28 of the United States Code, Section 1738A(e)? Title 28 of the United States Code, Section 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child."

16. Whether or not the father appropriately disciplined his daughter for being disrespectful by spanking her on her bottom with his hand?

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20. Whether or not the trial court erred in not enforcing the permanent custody Order of the Circuit Court of Fairfax County, Virginia and

further order that the children of the parties: Christina Lee Mitrano (now age 17); Peter Paul Mitrano (now age 15); and, Christopher Louis Mitrano (now age 10) be immediately returned to the father?

21. Whether or not the trial court erred in awarding attorney's fees for matters before courts in other jurisdictions?

22. Whether or not the trial court erred in requiring the father to pay the approximate sum of $3,000.00 per month for private boarding school in the State of New York for his daughter when no testimony was offered that the father had previous knowledge and/or consent of same or when no testimony was presented as whether said for private boarding school in the State of New York for his daughter was required?

23. Whether or not the trial court erred in ordering a psychiatric examination of the father against his will without an adequate basis in the record?

24. Whether or not the trial court erred in awarding attorney's fees without any testimony?

25. Whether or not the trial court erred in holding the father in contempt of court for signing the guardian ad litum stipulations under protest after the court threaten the father with contempt of court if the father did not sign said guardian ad litum stipulations against his will and over the objections of the father?

26. Whether or not the trial court erred in threatening the father with contempt of court for standing up to make objections?

27. Whether or not the trial court erred in refusing to allow independent court reporter to record part of the proceedings?

28. Whether or not the Supreme Court of New Hampshire erred in denying the father's Emergency Petition Seeking to Restrain and Stay the Actions of the State of New Hampshire, Grafton County Judicial Branch, Lebanon Family Division and also for Enforcement of the Attached Custody Order [Commonwealth of Virginia Child Custody Order] filed before said Supreme Court on or about January 10, 2001 and denied by said Supreme Court without prejudice shortly thereafter.

29. Whether or not the trial court erred in ordering the father to make child support payments in the amount of $1,406.00 per week?

Because of the number of issues presented, the father repeated the same herein in order to avoid any arguments that the father was attempting to exceed any page limitations through said questions. Because of said page limitations, the father will not address each issue herein. The father intends to file a motion with this Supreme Court to exceed the page limitation to address all the issues. The father's argument is:

The state courts in the State of New Hampshire lack subject matter jurisdiction. The father contends that the federal law trumps the state law in this action. In summary, the important points of the subject matter jurisdictional issues involving the trial court are that (1) the Commonwealth of Virginia issued a

custody order in compliance with 28 U.S.C., § 1738A on September 4, 1992; (2) any orders from New Hampshire are void and in violation of the federal law (28 U.S.C., § 1738A) in that the New Hampshire orders were issued ex parte and/or without subject matter jurisdiction.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of Virginia "made a child custody or visitation determination" consistent "with the provisions of" 28 U.S.C., § 1738A. Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia and has been since December 21, 2000. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C., § 1738A(c)(2)(E) and 1738A(d). 28 U.S.C., § 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

In *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Supreme Court ruled that 28 U.S.C., § 1738A is a full faith and credit statute.

Also see *Meade* v. *Meade*, 650 F.Supp. 205, 210 (N.C. 1986), *affirmed* 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson* v. *Thompson, supra,* wherein the court stated in part that:

> ". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree.
>
> "In further support of the conclusion that North Carolina lacks modification jurisdiction under the PKPA, the court holds that Virginia's September 3, 1985, decree modifying its initial award is consistent with Section 1738A and that order is entitled to enforcement by North Carolina as required by 28 U.S.C. § 1738A(a). Virginia, as the court granting the initial decree, has continuing jurisdiction under subsection (d) of the PKPA. See 28 U.S.C. § 1738A(c)(2)(E). The so-called continuing jurisdiction provision provides as follows:
>
> > The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section

> continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.
>
> 28 U.S.C. § 1738A(d). This provision imposes three requirements for the existence of continuing jurisdiction in Virginia: (1) a valid initial custody decree; (2) the present existence of jurisdiction under the laws of Virginia; and (3) **the current residence of one of the contestants or the child in Virginia**. Cf. *DiRuggiero* v. *Rodgers*, 743 F.2d 1009, 1016 (3d Cir.1984) . . . ." (Bold emphasis added.)

The father contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said Uniform Child-Custody Jurisdiction and Enforcement Act, 28 U.S.C., §

1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction. *Also see Dyer* v. *Surratt*, 466 S.E.2d 584, 587 (Ga. 1996) ("judgment that has not been modified by a court of another State with jurisdiction to do so may hear a Georgia-resident").

Moreover, the State of New Hampshire was not a "home State" on the dates that the mother of the children filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont part of the time with the mother prior to the filing of the petitions. In *Neger* v. *Neger*, 459 A.2d 628, 637-638 (N.J. 1983), the court stated:

> "As noted previously, the plaintiff and defendant had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month period assumes that residing with her father was only a visit. **However, the arrangement here was not truly characteristic of a visit, but consisted of fixed substantial**

> **periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state**. *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

*Also see Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein this Court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

*Also see* 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

The court ruled in *State Ex Rel. Conforti* v. *Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) that "[n]aturally, **as a federal jurisdictional statute**, the PKPA preempts the UCCJA by virtue of the Supremacy Clause. (Citation omitted)" (Bold emphasis added.) *Also see Shute* v. *Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992), wherein the court ruled that the PKPA preempts the UCCJA and/or the state statutes whenever there is a conflict between the same as to which state has subject matter jurisdiction concerning child custody.

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C., § 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or** (ii) had been the child's home State within six months before the date of

> the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State**;" (Bold emphasis added.)

Note that in interpreting the language **"and a contestant continues to live in such State"**, this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C., § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C., § 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language **"and a contestant continues to live in such State"**, this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent' continued to live in the state** . . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C., § 1738A provides that jurisdiction is lost by all parties moving out of the state prior to the conclusion of the proceedings under 28 U.S.C., § 1738A(c)(2)(A)(ii).

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject matter jurisdiction pursuant to 28 U.S.C., § 1738A. Note also that 28 U.S.C., § 1738A(c)(2)(B) does not apply because the Commonwealth of Virginia had prior jurisdiction under 28 U.S.C., § 1738A(c)(2)(A). *See* 32 Family Law Quarterly 267, 278 (1998), where it states:

> "In contrast, the PKPA seeks to limit the exercise of **initial custody jurisdiction** to the home state, if there is one. It does this **by prioritizing home state jurisdiction over significant connection jurisdiction**. [Footnote: 28 U.S.C. §

> 1738A(c)(2)(A) and (B).]" (Bold emphasis added.)

In *Harris* v. *Simmons*, 676 A.2d 944, 949-950 (Md. 1996), reconsideration denied, certiorari denied 684 A.2d 454, the court stated:

> "The UCCJA must be read in conjunction with the federal Parental Kidnapping Prevention Act ('PKPA'). [Footnote omitted.] This Court has held that when a child has a home state, the PKPA 'forbids the use of significant connections as the basis for jurisdiction in child custody litigation.' (Citations omitted.)"

Also note that in the case of *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987), the court stated:

> ". . . The provisions of this federal legislation indicate a congressional intent that the act be applied in all interstate custody disputes. State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. (Citations omitted.) **The federal statute uses language more specific than the UCCJA in limiting modification jurisdiction** . . . ." (Bold emphasis added.)

Another case discussing this issue is *Clarke* v. *Clarke*, 496 A.2d 361, 363 (N.H. 1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.) Under the Uniform Child Custody Jurisdiction Act (UCCJA), which New Hampshire adopted in 1979 as RSA chapter 458-A, initial jurisdiction and modification jurisdiction are governed by different standards. 'Initial jurisdiction is primarily in the home state of the child,' while '[j]urisdiction to modify an existing custody decree is reserved for the state that rendered the decree.' (Citations omitted.)"

The State of New Hampshire clearly did not have subject matter jurisdiction to modify the custody order from the Commonwealth of Virginia. In *Via* v. *Johnston*, 521 So.2d 1324, 1326 (Ala. 1987), the court stated:

> ". . . However, we have held in *Mitchell, supra*, that the PKPA does not recognize an emergency as granting modification authority; rather, it expressly states that a sister state's judgment can only be modified as is provided in § 1738A(f), *supra*. *Mitchell*, however, goes on to say that neither the best interest rule nor the emergency rules as to custody were abolished by the PKPA. Congress, however, established the proper forum for the determination of

> such issues in modification proceedings . . . ."

The language of 28 U.S.C., § 1738A provides clearly that under the facts the custody order from the Commonwealth of Virginia must be enforced. In *Eichelberger* v. *Eichelberger*, 345 S.E.2d 10, 12 (Va. 1986), the Court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. *Andrews* v. *Geyer*, 200 Va. 107, 104 S.E.2d 747, 751 (1958)."

It is important to note that the mother has wrongfully failed to return the two boys to the father after her scheduled visitation ended on Monday, January 8, 2001. The father has not seen any of his three children since January 5, 2001.

*Arguendo*, even if New Hampshire had jurisdiction under 28 U.S.C., § 1738A (which the father steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the other children of the parties would be void because no notice whatsoever was given as required under 28 U.S.C., § 1738A. 28 U.S.C., § 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been

> previously terminated and any person who has physical custody of a child."

In addition, there was no contact made by the State of New Hampshire to the Commonwealth of Virginia prior to the entry of any of the change of ex parte custody orders that the State of New Hampshire has made to date. *See Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama"; also *see Joel M.* v. *Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever—much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F.* v. *Bennet S.*, 131 Misc.2d 854, 502

> N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Accordingly, it is clear that the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under 28 U.S.C., § 1738A (even if New Hampshire had jurisdiction under 28 U.S.C., § 1738A which the plaintiff steadfastly denies).

Note that in *Mebert* v. *Mebert*, 444 N.Y.S.2d 834, 837 (1981), the court emphasized that the jurisdictional requirements must be met:

> "It is true that even though the Supreme Court had both the personal jurisdiction necessary to enter a decree of divorce, it may have lacked the subject matter jurisdiction necessary to make a custody determination. (Citation omitted.)
>
> ". . . From its plain meaning of the statute (Citations omitted) this court must conclude that under the federal law the best interest of the child can not be looked at in a custody matter unless the jurisdictional prerequisites set forth in the federal statute are met, including the requirement that the child 'immediately preceding the time involved' must have lived in this state with one of its parents for at least six consecutive months. (Citation omitted.) (Bold emphasis added.)

Moreover, other courts have held that it is not contempt of court for a party to move out of a

court's jurisdiction with their children. In *Lynch* v. *Uhienhopp*, 78 N.W.2d 491, 495 (1956) the court referred to a case of a mother moving with her child out of the court's jurisdiction and the court was found to wrongfully held the mother in contempt of court because there was "no specific prohibition" preventing the mother from moving:

> "So in *Ex parte Vaughn*, 205 Ala. 296, 87 So. 792, 793, it was held that the divorced mother was not guilty of contempt for removing the child from the jurisdiction of the court and so in effect depriving the father of visitation rights granted him by the decree, there being no specific prohibition against such removal. The Alabama Supreme Court said: 'It has been held that the charge of contempt cannot be established for failure to comply with uncertain orders or judgments.'"

In addition, the father was fearful that the mother would not return the children on January 8, 2001 (a Monday morning); and, pursuant to the Virginia custody order, requested the courts in the Commonwealth of Virginia by and through a Petition for Emergency Order filed on January 5, 2001 to prevent the mother from removing the children from the Commonwealth of Virginia. Earlier in the week of January 5, 2001 the mother along with her brother-in-law, William Philips (a lobbyist and former chief of staff to Senator Ted Stevens of Alaska), attempted to remove the children from their schools in Fairfax County, Virginia and the schools refused to release the

children to the mother; thereafter, they came to the place of resident of the father at 4912 Oakcrest Drive, Fairfax, Virginia with two police cars and attempted again unsuccessfully to obtain the children. The father has not seen his children since he turned the children over to the mother for visitation on January 5, 2001 in the Commonwealth of Virginia. On January 8, 2001, the father after giving verbal notice to the attorney for the mother, filed the Emergency Petition for Enforcement of the Custody Order in the Circuit Court in Fairfax, Virginia. The court denied said petition. The trial judges stated in the Trial Judges' Corrected Statement of Facts Filed Pursuant to Rule 5:11 [Rules of Virginia Supreme Court]: that in "neither instance did the trial judge conclude that a genuine emergency existed". See A-16. It is important to note that contrary to the statement therein that "Defendant's counsel was not notified by plaintiff that he was seeking relief from Judge Valentine's order in the Circuit Court", the father did in fact verbally advise defendant's counsel, Christopher W. Schinstock, Esquire, (who was from the law firm hired by William Philips) immediately after the hearing before the Fairfax County Juvenile and Domestic Relations Court that the father was presenting said petition to the Circuit Court. Furthermore, note that the term "facially valid" was used in reference to the New Hampshire order. (A17) Judge Hudson stated that he was not going to read the pleadings the father submitted with his petition and did not read said pleading prior to denying the father's petition.

Judge Hudson further stated that he made no decision on the merits of the father's petition. (A17)

Also note that the father has been unsuccessful in attempting to have the State of Vermont enforce the custody order from the Commonwealth of Virginia. See *Mitrano* v. *Kelly*, 534 U.S. 1115 (2002).

**Conclusion**

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of New Hampshire and also the judgment of the Family Court at Lebanon, Grafton County, New Hampshire.

Respectfully submitted,

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Petitioner

Dated: December 2002.

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2. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.